

3 ANN MARIE STINNETT,

4 Plaintiff,

5

Case No. 10-15043

6 BROOKS KUSHMAN, P.C. & MARK A. CANTOR, Hon. Paul D. Borman

Defendants.

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12 APPEARANCES.

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1 Detroit, Michigan
2 December 28, 2010
3 at about 10:03 a.m.

4 - - -
5 (Court, Counsel and parties present.)

6 THE CASE MANAGER: All rise.

7 Court is in session, Judge Borman presiding.

8 THE COURT: Okay, please be seated. This is
9 Case No. 10-15043, Stinnett vs. Brooks Kushman, P.C. and
10 Mark Cantor.

11 Will the parties please identify themselves for the
12 record, beginning with the Plaintiff.

13 MS. STINNETT: Your Honor, my name is Ann Marie
14 Stinnett, and I represent the Plaintiff in this case.

15 THE COURT: Okay. And for Defendants.

16 MR. BRETZ: Daniel Bretz and Tracy Leahy on behalf
17 of the Defendants. I'm here with Earl LaFontaine who is a
18 shareholder in the firm Brooks Kushman.

19 THE COURT: Okay. Have a seat.

20 What I have before me, initially the case was filed
21 and then I believe it was -- was it Wednesday or Thursday
22 that the Defendants came with the motion?

23 MS. LEAHY: Wednesday.

24 MR. BRETZ: Wednesday, Your Honor.

25 THE COURT: It was late in the day, and at that

1 time I tried to reach Ms. Stinnett and was unable to. I did
2 issue just a temporary order to seal pending a hearing, and
3 the next morning, Thursday morning, I called Ms. Stinnett and
4 spoke with her and set the hearing date that was
5 accommodating for everybody here. So with that history then
6 we will proceed with the Defendants' motion.

7 MR. BRETZ: Thank you, Your Honor, and thank you
8 for hearing this motion on an expedited basis. As I said, my
9 name is Daniel Bretz. I represent the Defendants.

10 Just some brief background, Your Honor.

11 Brooks Kushman is an intellectual property law firm. It has
12 about 70 attorneys.

13 THE COURT: A little too fast because the court
14 reporter has to take down every word, okay.

15 MR. BRETZ: I'm sorry. The Plaintiff was employed
16 as an associate attorney in the firm for about five
17 and-a-half years from August of 2003 to February of 2009. In
18 February of 2009 as an intellectual property firm the firm
19 was faced with the potential bankruptcy of its two major
20 clients, General Motors and Lear Corporation. It went
21 through a painful reduction in force. Nine employees in
22 total were eliminated from the workforce, two of them were
23 attorneys, and one of them was Ms. Stinnett, and one was a
24 male associate in the firm, and they were selected for the
25 reduction in force based on their production and their

1 financial contribution, their hours, to the firm.

2 Following that reduction in force, five of those
3 nine employees went to the EEOC en masse and filed charges.

4 Those were all resolved through the EEOC conciliation
5 process. Following the resolution of those five charges,
6 Ms. Stinnett filed an EEOC charge as well. She filed hers
7 October 5, 2009.

8 The EEOC issued a dismissal of that charge with a
9 finding it was unable to conclude based on the information
10 presented that there was any violation of Title 7. Four
11 months later, although there is a 90-day right-to-sue letter
12 issued, a month beyond the 90 days, four months later
13 Ms. Stinnett filed the instant lawsuit. And the lawsuit
14 is -- what we are here on today contains 204 paragraphs and
15 8 counts, and they are under -- the counts are under state
16 and federal law for sex harassment, sex discrimination,
17 retaliation and violation of the equal pay act. Those four
18 claims multiplied by the state and federal law result in
19 eight counts.

20 We are here today because contained in those
21 204 paragraphs are allegations that are so far outside of the
22 bounds of proper pleading that it is transparent that their
23 inclusion was just an attempt to embarrass, if not humiliate
24 and destroy, the law firm and the individuals who work there.
25 And we have identified the offending paragraphs in our

1 pleadings, and we are here today, Your Honor, first on the
2 motion to strike those irrelevant, immaterial and frankly
3 scandalous accusations that have nothing to do with
4 Ms. Stinnett's claims.

5 We are here under Federal Rule 12(f) which allows
6 the Court to strike those paragraphs based on those
7 standards. The first series of paragraphs I want to deal
8 with are 43 through 52, and then again 105 through 114 and
9 the attached Exhibits C, D and E. So those paragraphs and
10 those exhibits deal with an attempt to raise accusations by
11 third parties who are unnamed and have submitted unsworn
12 statements to the EEOC, and Ms. Stinnett is trying to include
13 those into this case when those experiences of those
14 individuals have nothing to do with her.

15 THE COURT: One of the arguments that the Plaintiff
16 makes is that to show a continuing environment of harassment
17 that the law allows or, indeed, requires showing this
18 historical situation relating to other individuals, and
19 therefore it is appropriate to -- I might as well use the
20 microphone -- that it is appropriate and necessary to include
21 that information.

22 MR. BRETZ: Several responses, Your Honor. First,
23 the allegations of these others are all time barred.
24 Secondly, in order to make them relevant or material to her
25 claims she has to have stated a viable claim for sexual

1 harassment, and it is that point that I want to address here
2 today. Her claim for sexual harassment on the face of the
3 pleadings is not viable. Her claim for sexual --

4 THE COURT: Is this a motion to dismiss that you
5 are making?

6 MR. BRETZ: No, Your Honor, but it is a motion to
7 strike the immaterial pleadings, the immaterial references in
8 a Complaint. We can -- we have not yet been served with the
9 Complaint but as soon as we are we will be filing a 12(b) (6)
10 motion.

11 THE COURT: You don't have a copy?

12 MR. BRETZ: I have a copy. I'm willing to accept
13 service. That's not an issue, but we don't have a timing set
14 up yet for a 12(b)(6) motion.

15 THE COURT: Okay.

16 MR. BRETZ: And I do acknowledge that we are asking
17 the Court to look forward a bit, but your question, I think,
18 anticipates that, is this evidence sufficient to come in or
19 allowable in this case.

20 THE COURT: I'm not ruling on the evidentiary
21 issue, I'm just saying in the Supreme Court precedent with
22 regard to harassment and retaliation, are these types of
23 claims relevant?

24 MR. BRETZ: Yes. The Supreme Court in Sprint vs.
25 Mendelsohn ruled that me-too evidence, which I think this

1 evidence fits in that category, is not per se admissible or
2 inadmissible, the Court has to look at Rules 401 and Rule 403
3 of the Federal Rules to make a case by case determination.
4 So that is a future state that we may end up at, but what I'm
5 asking the Court to do is to look at the face of the
6 pleadings today. There is no need for 204 paragraphs with
7 all of these scandalous accusations for her to state a viable
8 claim.

9 Secondly, we think that --

10 THE COURT: I guess it is like a slippery slope
11 here, if you're saying that there is enough to submit a
12 viable claim without these then, except for the statute of
13 limitations arguments, then are you saying that this -- the
14 Complaint is not subject to 12 --

15 MR. BRETZ: No, that's not --

16 THE COURT: -- motion to dismiss because if you're
17 saying that it is and it is not just limited to the statute
18 of limitations issue then --

19 MR. BRETZ: No. What I'm trying to say, Your
20 Honor, inarticulately --

21 THE COURT: No, you're doing fine.

22 MR. BRETZ: -- is that for her to submit a notice
23 pleading she doesn't need to attach all of this me-too
24 evidence.

25 We can deal with that as evidence in discovery. If

1 she survives a 12(b) (6) it doesn't need to be in a Complaint
2 for her to file a Complaint in this Court. That's what I'm
3 trying to say.

4 Looking at what she has alleged in terms of sexual
5 harassment the question is does this me-too evidence have any
6 nexus to her allegations. We submit on the face of the
7 pleadings it does not. Her allegations, and we have recited
8 those in the brief, are completely non-sexual in nature. Her
9 allegations which she labels sexual harassment are, to put a
10 label on it, Your Honor, are truly petty workplace disputes.
11 She says that in 2004 a time-barred event occurred where the
12 senior partner put his arm around her at a firm retreat
13 standing alone. In 2006 a senior partner invited her to
14 accompany him to the auto show, she said no, that was the end
15 of it. In March 2006 she was, quote, ordered to move her
16 office next to a senior partner.

17 THE COURT: Whom she had previously told people at
18 the firm she didn't want to be near the guy because of
19 previous conduct that made her uncomfortable.

20 MR. BRETZ: Previous conduct that was never sexual
21 in nature. The face of the Complaint there is no allegation
22 of request for sexual favors, comments of a sexual nature,
23 innuendo, attempts to come on to her, all of this is neutral
24 conduct.

25 Now, she can go forward with those allegations and

1 she will be responsible to meet or exceed the standards for
2 12(b)(6) and Rule 56, but these -- what I'm trying to say is
3 these accusations or allegations of others, some of which
4 occurred in 1994, some of which occurred in 1998, have
5 nothing to do with the accusations she has raised. She does
6 not claim she was ever aware of the experiences of others.
7 She does not claim she witnessed them. She does not claim
8 that they were ever brought to her attention. She does not
9 claim she ever complained about them.

10 THE COURT: Isn't there Sixth Circuit precedent
11 that says that these types of matters are relevant to claims
12 now?

13 MR. BRETZ: There is Sixth Circuit precedent that
14 says they can be in a proper case.

15 THE COURT: Right.

16 MR. BRETZ: And there is precedent in Sixth Circuit
17 and elsewhere that excludes this evidence. In fact, I think
18 there is an opinion I have of yours where you excluded
19 evidence in a discrimination case of me-too type --

20 THE COURT: That was probably before the more
21 recent Sixth Circuit. I mean, I'm not trying cover myself --

22 MR. BRETZ: No.

23 THE COURT: -- but I think my decision was previous
24 to the Sixth Circuit opinion that said, you know, that is
25 appropriate.

1 MR. BRETZ: Well, it is safe to say, Your Honor,
2 there is no bright line one way or the other.

3 THE COURT: Right.

4 MR. BRETZ: It is a case by case and it is left to
5 the Court's discretion under the Federal Rules of Evidence.
6 So back to where we are today.

7 THE COURT: But you say there is nothing sexual in
8 the Complaint, and I don't know if we are arguing a motion to
9 dismiss, but you're saying that paragraph 14 where he came --
10 in 2004 the allegation is that the individual came up behind
11 her and forcibly put his arm around her shoulders and brought
12 her within inches of his face, she took his arm away, backed
13 away and said keep your hands to yourself in which the
14 allegation is at that point the Defendant laughed as did a
15 co-shareholder of the firm.

16 Then the issue about the lost papers, you know,
17 that may or may not be building on that, but then you have
18 the situation, you know, where the Defendant allegedly said,
19 you know, come on with me to the auto show and she said no.
20 And then combining with that the office location matter
21 where, you know, is there something about that that again
22 taken in the light, although we are not dealing with a motion
23 to dismiss, but this is not neutral conduct and so to that
24 extent it begins to have some legs, as to where it takes you,
25 that's a question going further in the Complaint, but then as

1 you point out we have the unsworn Exhibits C, D and E, and
2 then we go back to the question of the conduct at the firm
3 that resulted in her dismissal.

4 Your argument seems to be that this other conduct,
5 first of all, may not be admissible. Second, that it
6 certainly is not involving her as to C, D and E, and to the
7 extent that you dispute it that you claim that it is
8 scandalous or not appropriate. Other issues I guess that
9 would relate is Rule 8, whether you attach evidentiary
10 material to a Complaint or not, and in addition to Rule 12.

11 MR. BRETZ: That's right, you have summarized our
12 positions correctly. As to her allegations, just to clarify
13 my points, it is -- the allegations that she makes that the
14 Court recited in 2004 and 2006 are time barred, first of all.
15 Secondly, they are not severe or pervasive. They are
16 isolated instances. And thirdly, looking at them even in a
17 light most favorable, I would submit they are not sexual in
18 nature. There is no evidence that --

19 THE COURT: The light most favorable to who, you or
20 her?

21 MR. BRETZ: To her.

22 THE COURT: Okay.

23 MR. BRETZ: Finally she never complained about any
24 of this despite receipt of the firm policies and handbooks.
25 So that's what I'm saying, looking at it in totality of her

1 claim of sexual harassment, how does she then reach from
2 those very empty allegations, in my opinion, to reach out to
3 other's experiences, time barred, unsworn and unrelated and
4 unknown to her. I think that is the kind of case where a
5 court, if presented with an evidentiary requirement or
6 ruling, would say, no, that does not connect up with your
7 case, but in this situation when we are talking about those
8 pleadings and a Complaint there is no proper purpose at this
9 point to include those allegations. Let us deal with the
10 12(b)(6) motion, let us deal with a Rule 56 motion, let's
11 deal with motions in limine and we can address those other
12 issues, but they are improper certainly at this point.

13 We have submitted an affidavit of Mr. LaFontaine,
14 and he's here today if the Court wants to question him, that
15 this has already had an impact on the firm. It has been
16 picked up on the Internet. It has gone viral. There's phone
17 calls being made to the firm by reporters, by competitors of
18 the firm, by clients of the firm. There's indication that
19 the firm's potential to obtain new business, as testified to
20 in Mr. LaFontaine's declaration, are in jeopardy. This is
21 all based on this highly tangential, I would submit totally
22 impermissible, evidence that has nothing to do with the
23 Plaintiff.

24 Finally, what is the harm to the Plaintiff to
25 striking or sealing the record at this point? I would submit

1 that there is none. This is not a case of public concern.
2 This is not a case where a government agency has decided to
3 prosecute an entity. These are private parties who are going
4 to engage in private discovery on these issues. In fact, the
5 EEOC chose not to prosecute this case indicating that there
6 is no public interest at play here. We have attached the
7 Flag case from Judge Rosen where he goes through a very
8 lengthy --

9 THE COURT: Yes, he does.

10 MR. BRETZ: -- analysis --

11 THE COURT: Excuse me. You don't need to be here.
12 Thanks.

13 (Court security officer was excused at 10:20 a.m.)

14 MR. BRETZ: -- of the court's power and discretion
15 to seal a record, and I would submit that case certainly has
16 more --

17 THE COURT: That obviously deals with discovery in
18 a case that is filed. In this case we are not dealing with
19 discovery, does that make any difference, or are we dealing
20 with the same issues?

21 MR. BRETZ: No, but in terms of the principles of
22 law I think we are dealing with the same issues, in terms of
23 sealing a record, in terms of sealing discovery proceedings,
24 in terms of determining at this point in the case what is
25 necessary and not necessary for the case to proceed. I think

1 those milestones that Judge Rosen laid out are apt here, that
2 this is not an opportunity to libel individuals through
3 pleadings. It is an opportunity for Plaintiff to have her
4 grievance heard, and I would submit these extraneous matters
5 have no relevance and no proper purpose for her grievance to
6 be heard.

7 THE COURT: In the briefing obviously we think
8 about and indeed follow the Sixth Circuit precedent in Brown
9 and Williamson Tobacco vs. The Federal Trade Commission and
10 in Re: Knoxville Newspapers. So where does that take us in
11 terms of you arguing that because it doesn't involve smoking,
12 health issues, that it is a different --

13 MR. BRETZ: Essentially, Your Honor, I think
14 that's -- to amplify, those cases involve matters of public
15 concern and prosecutions by government agencies. The FDIC
16 was involved in the one case, in the Knoxville case, and
17 newspapers sought to have the government's decision to seal
18 the record reviewed.

19 THE COURT: But the language is pretty broad like
20 in Knoxville, the 1983 decision, only the most compelling
21 reasons can justify the non-disclosure of judicial records.

22 MR. BRETZ: Right. Remember our motion, the thrust
23 of our motion, first is to strike, which is not the subject
24 of Knoxville and Brown. Second is for a protective order,
25 again, which is not the subject of Knoxville and Brown, and I

1 would submit the Flag case properly addresses the protective
2 order issue. And, yes, thirdly, is to seal what is remaining
3 until the Court has an opportunity to make a decision. In
4 other words, we are sealing the case through the discovery
5 phase. It is really more akin to a protective order under
6 Rule 26, and as Judge Rosen recognized in distinguishing
7 Knoxville and Brown, discovery proceedings are not public,
8 especially involving private parties. The public does not
9 have a right to know what is said at depositions. The public
10 does not have a right to know what is exchanged in
11 interrogatory information. That's because the parties -- the
12 discovery rules are liberal and the parties have an
13 opportunity to present to the Court what should or should not
14 come into evidence. So we are saying given the nature of
15 these allegations, given the irreparable harm that has and
16 has the strong potential to occur based on these allegations
17 we would request that the Court seal the record until the
18 Court has an opportunity to make a decision.

19 In the Brown case, as Judge Rosen pointed out, that
20 seal lasted throughout the District Court proceedings and on
21 into the appeal phase, and that's where the Sixth Circuit
22 drew the line and said, no, you're trying to seal information
23 that went into the court's decisions that are now before us
24 and we are not going to allow that. I'm not asking for that.
25 I'm asking for a seal until the opportunity -- the Court has

1 the opportunity to make those decisions.

2 THE COURT: Okay. Let me hear from the Plaintiff,
3 and then I will call you back since you're the moving party.

4 MR. BRETZ: Just one --

5 THE COURT: Sure.

6 MR. BRETZ: For clarity, I apologize, there are
7 certain other paragraphs that we have asked to be sealed.

8 THE COURT: Right, right.

9 MR. BRETZ: One deals with a highly confidential
10 settlement which I believe was a matter in front of this
11 Court that --

12 THE COURT: No, it was the Expeditors case.

13 MR. BRETZ: I'm sorry, a different case.

14 THE COURT: I didn't have that other one, it was
15 probably a court in another district.

16 MR. LaFONTAINE: California.

17 MR. BRETZ: Yeah. Those allegations in the
18 Complaint about that settlement have no bearing to anything
19 and should be stricken. We do not want to jeopardize that
20 settlement. The law firm does not want to jeopardize that
21 settlement for purposes of its client, so those paragraphs we
22 would ask to be struck as well, and those are 100 and 101.

23 Also, the references to what went on at the EEOC in
24 terms of settlement, those are not admissible and not
25 relevant, those are 123 and 24.

1 Finally, I apologize it is not in our motion, we
2 would ask to strike paragraphs 29 through 32 about theft,
3 alleged theft, of documents by one of the attorneys in the
4 firm. Again, there is no purpose for that other than to
5 defame or libel him through what would otherwise be
6 privileged pleadings.

7 THE COURT: Okay. That deals with Mr. -- well,
8 that other individual --

9 MR. BRETZ: Yes.

10 THE COURT: -- at the firm?

11 MR. BRETZ: Yes, 29 through 32. Thank you, Your
12 Honor.

13 THE COURT: Okay. Let me get a sip of water and
14 then we will continue. Good morning.

15 MS. STINNETT: Good morning, Your Honor.

16 I just have a few points that I would like to make
17 in response.

18 THE COURT: Okay.

19 MS. STINNETT: And the first point that I would
20 like to make would be that the harm that they are saying that
21 has occurred, I believe that there are others who are still
22 at the firm and others who have recently left the firm where
23 this case I think should be available to the public so that
24 they are aware of what is going on, and especially since I
25 learned yesterday when I received their reply it appears that

1 other clients are now interested in the case, and so that's a
2 reason that I believe that this case should be open to the
3 public in accordance --

4 THE COURT: Is it open? In other words, what is
5 the status? I saw a website called 360. Is that -- and
6 apparently there is -- and I didn't have the money to get it
7 all, but in the response by the Defendants they gave me the
8 whole story that is on 360 so --

9 MS. STINNETT: Yes, Your Honor. I got a phone call
10 Monday -- I had filed the lawsuit late Sunday -- from a lady
11 by the name of Melissa Lipman.

12 THE COURT: Could you spell the last name just to
13 help the court reporter?

14 MS. STINNETT: L-I-P-M-A-N.

15 THE COURT: Thank you.

16 MS. STINNETT: And she asked me for any comments
17 that I might have. I was quite surprised to have such a
18 quick response to the Complaint that I had just recently been
19 filed, and she had told me that her deadline for this article
20 was Monday at 5:30 p.m., and I gave her my comments, I just
21 made a couple of them, as well as Brooks Kushman also had
22 some comments to be included in the article, and that was it.
23 I guess after 5:30 p.m. on Monday my husband told me that the
24 article is already out, and when I -- I did do a temporary
25 seven-day trial of Law360 just to get the article.

1 THE COURT: So you did?

2 MS. STINNETT: Yes, Your Honor, and when I had done
3 that I had learned that the Complaint, that is my Complaint,
4 is actually posted on the Law360 website, so it is as of
5 Tuesday of last week it was on there. I don't know if
6 anything has changed, but if you, I guess, subscribe you are
7 able to get a copy of the Complaint.

8 THE COURT: Well, no, I received a full copy
9 through the Defendants included as an exhibit in their sealed
10 reply, right?

11 MR. BRETZ: Correct.

12 THE COURT: Right.

13 MS. STINNETT: So that's sort of, I guess, the
14 story behind there. I have not gone to any media or anything
15 to date. I don't see the need to do that at this point, but
16 I do understand that the nature of the case is such where the
17 news media may be interested in it.

18 THE COURT: Okay.

19 MS. STINNETT: I just briefly want to address one
20 point that was made earlier in the beginning having to do
21 with receiving the right-to-sue letter. There was a mistake
22 at the EEOC with my address. I had gone to the EEOC on
23 October 5th, basically I had spoke to one of the intake
24 questionnaire supervisors, she had written my, what they call
25 a charge, and had my correct address and everything on there.

1 Subsequently I would have to repeatedly check with the EEOC
2 probably every couple months just to get a status of where
3 the case is. They never notified me. I was always checking
4 up on them. I had checked up on them on November 17th
5 because I still hadn't heard anything, and I was informed
6 that about 92 days ago they had sent me a right-to-sue
7 letter, and I said, well, I never received that. She said,
8 well, is this your address, and she read off the address that
9 the letter was sent to, and it was not, it was off by a
10 couple digits.

11 At that point they faxed me like within five
12 minutes a copy of the right-to-sue letter. They told me that
13 they were putting the right-to-sue letter in the mail. I
14 asked is there anything I can do because I know the opposing
15 side is going to make an issue of this, is there anything
16 that I can do, can you document that you didn't send it to
17 the correct address? She said, no, we are not going to do
18 that.

19 The very next day I put forth a congressional
20 inquiry into the matter. I went to Senator Carl Levin's
21 office and just dropped off a packet, which I have a copy of
22 if you would like to see it, and it just basically says that
23 my address is this and they had my correct address on
24 October 5th, somewhere in the computer system something
25 happened to where they sent the letter to an incorrect

1 address. I received a phone call back from Senator Levin's
2 office saying that the time limit starts when the plaintiff
3 receives the letter, and since you received it on
4 November 17th, as the fax is shown, that that is when your
5 time clock started. So I just wanted to clear that up in the
6 case.

7 THE COURT: So he could be a witness here?

8 MS. STINNETT: Well -- I'm sorry, Your Honor.

9 THE COURT: Senator Levin, okay.

10 MS. STINNETT: So that's a little bit of the
11 background on that.

12 I just wanted to say that I keep hearing about how
13 things are time barred, and I quoted a case from the United
14 States Supreme Court that talks about the workplace
15 environment and how you sort of have to allege other things
16 according to the law in order to even be able to prevail
17 under the law, and it does say that other instances --

18 THE COURT: Why don't you just mention the case
19 just so we are all on the same page?

20 MS. STINNETT: Sure. It is National Railroad, it
21 is on page 7 of my opposition.

22 THE COURT: Okay.

23 MS. STINNETT: National Railroad Passenger
24 Corporation --

25 THE COURT: Otherwise known as Amtrak.

1 MS. STINNETT: -- vs. Morgan.

2 THE COURT: M-O-R-G-A-N.

3 MS. STINNETT: I have the cite if you would like
4 that. It is 536 U.S. 101, dated 2002.

5 THE COURT: Right, okay.

6 MS. STINNETT: Basically it just says that the
7 incidents that have occurred even prior to the 180- or
8 300-day time limits are all considered one complete, I guess,
9 one component, so I am able to include things that sort of
10 paint the picture of it because they said inherently
11 workplace harassment it doesn't occur -- it is not a one-time
12 incident, it is a repeated sort of -- that's sort of the
13 nature of it, and so that's why they allow you to plead it
14 that way.

15 THE COURT: Let me ask a question. There's two
16 categories of matters that the Plaintiff -- I'm sorry, the
17 Defendants have concern about, the moving party, one is the
18 affidavits of -- not the affidavits, strike that, the
19 statements of C, D and E which are not sworn and which are in
20 the nature of similar acts under 404(B) but that you also
21 say, well, they are part of the atmosphere. That's something
22 the Court notes that Rule 8 talks about pleadings, that they
23 be concise and direct. And is this going -- is this going
24 beyond that? In other words, one request is to strike them
25 from the Complaint, it does not exclude them down the line,

1 if they become relevant they then become subject to discovery
2 issues, motions, things like that. What is your response to
3 that?

4 MS. STINNETT: Well, Your Honor, I would like to
5 say that the exhibits to the Complaint I took great care in
6 making sure that I redacted very important information and
7 personal information. I have no desire to expose these
8 ladies because they have moved on and they are in a current
9 job. I have also taken great care, if you were to see the
10 entire Complaint it doesn't allege simply sexual harassment
11 and retaliation.

12 THE COURT: Right.

13 MS. STINNETT: It alleges other disability
14 discrimination, age discrimination, many other types of
15 discrimination that would actually --

16 THE COURT: Your Complaint doesn't allege
17 disability?

18 MS. STINNETT: Correct, that's why I redacted.

19 THE COURT: Oh, some of theirs you're saying?

20 MS. STINNETT: Oh, yes, Your Honor. And if I
21 wanted to infuriate people or make the firm embarrassed I
22 would have included those things. I did not include those
23 things. They were very inflammatory, in my opinion, and had
24 nothing to do with my case.

25 THE COURT: Right, but as it sits now these

1 exhibits are not essential in terms of Rule 8, in short, in
2 plain statement, they are surplusage, so with regard to them
3 what is your feeling as to their existence in the record as
4 we speak?

5 MS. STINNETT: Well, Your Honor, one of the
6 exhibits, which would be Exhibit C, puts a timestamp, it says
7 1994 and it describes an event that was documented by the
8 firm in an evaluation of a secretary. And I think it is very
9 important to my case to show that the firm was very aware of
10 what had happened, it was alleged that Defendant Cantor
11 unzipped her top in the hallway, and it also shows that there
12 were witnesses involved in that. And I believe that the
13 story that goes behind it and the story that describes the
14 workplace harassment that has continued from that time
15 supports my harassment claims and it cites specific examples
16 of how other women who are in my protected group have also
17 suffered the workplace harassment at this particular firm.

18 THE COURT: Okay. With regard to the settlement
19 issue on that lawsuit, the Defendants have a significant
20 concern in terms of their business. It seems to me like it
21 is put in there to relate to the question of whether it was
22 really valid or not to do the rifts as to whether they were
23 facing financial precariously -- precarious financial
24 situation.

25 MS. STINNETT: Absolutely, Your Honor. I would

1 like to just clarify that, if you actually read --

2 THE COURT: It doesn't say the specifics?

3 MS. STINNETT: It doesn't even say the word
4 settlement. If you were to actually read number 100 and 101,
5 if you were to read that and if you did not know that there
6 was a settlement, which I never said the word settlement, you
7 would read that Brooks Kushman received this money on the
8 merits. I had said that they won an appeal. So I don't
9 understand why they are bringing in -- I did not say --
10 didn't breathe a word of settlement, so their issue, I think,
11 is moot on that.

12 THE COURT: Okay. The others I will call a
13 relation to the request relating to the paragraphs that deal
14 with Exhibits C, and then we get to 43 through 52, so that
15 again relates to -- when it says upon information and belief
16 is this based upon an exhibit, for example, Exhibit C?

17 MS. STINNETT: No, Your Honor. I actually spoke to
18 the female accuser in detail where she shared it with me and
19 other folks as well.

20 THE COURT: And that deals with D and E as well?

21 MS. STINNETT: Yes, Your Honor.

22 THE COURT: Okay. But they relate to these
23 complaints that were filed with the EEOC by C, D and E?

24 MS. STINNETT: They were submitted to the EEOC.

25 THE COURT: Okay. And with regard to the matters

1 beginning with 100 to 101, basically your argument is that
2 they were -- they were contingency cases, period, and as to
3 how they got --

4 MS. STINNETT: Yes, Your Honor. I didn't talk
5 about settlement in those allegations.

6 THE COURT: Okay. Then as to get to the 105
7 through 114, that deals with the --

8 MS. STINNETT: Right.

9 THE COURT: -- EEOC Exhibit D, right?

10 MS. STINNETT: Correct, D and E, and it basically
11 shows that once President Ernie Brooks passed away --

12 THE COURT: Right, things changed.

13 MS. STINNETT: Correct, Your Honor, that's what
14 that shows.

15 THE COURT: Then we get to the question of the
16 settlement, and what is the relevance of 123? If you can
17 turn to that.

18 MS. STINNETT: Well, Your Honor, I don't say
19 anything in 123 or 124 about any type of an EEOC settlement.
20 If you read exactly what I wrote I say that they settled
21 claims, and not everyone filed an EEOC complaint, and not
22 everyone settled claims at the EEOC mediation, so I don't say
23 anything like that. I'm simply trying to show that the firm
24 by settling claims has knowledge obviously of what occurred
25 and yet they still haven't fixed the situation or rectified

1 it in any way, and continues to go down the wrong path of
2 discrimination which relates back to my prayer for relief
3 where I ask for certain things to be done to help the folks
4 who are still at the firm.

5 THE COURT: Okay. Also were you in any way
6 involved in that lawsuit that settled? I'm just wondering in
7 terms of --

8 MS. STINNETT: No, I'm not, Your Honor.

9 THE COURT: So you're not someone who was involved
10 and then --

11 MS. STINNETT: I had nothing to do with the case.

12 THE COURT: Right. Okay. Let me ask the question,
13 the Defendant is asking for various relief. Do you have --
14 in responding, one thing is to strike certain paragraphs,
15 another is for a protective order, and the third is to seal
16 certain parts of the Complaint. I would like to hear from
17 you with regard to your response as to objections, and if
18 there were to be any relief which you would feel that is
19 least harsh from your point of view.

20 MS. STINNETT: Well, Your Honor, I would like to
21 say that they say in the first part of their request they
22 would like a protective order treating it as confidential and
23 inaccessible to the public the Complaint, the exhibits and
24 basically all other pleadings filed in this matter which, in
25 a way, is sort of sealing in my opinion --

1 THE COURT: Well, then they are really saying just
2 the parts that Mr. Bretz mentioned.

3 MS. STINNETT: Right, Your Honor.

4 THE COURT: The paragraphs.

5 MS. STINNETT: Right. And then they would like to
6 strike certain paragraphs, and I think we spoke in detail
7 about the specific ones and my position on those. If you
8 have any questions it is in my brief as well. Striking the
9 exhibits, we spoke about that, but then alternately they
10 would like to request that the Court seal all court documents
11 in this matter, and I believe that there is a public interest
12 in making sure that this stays open, it is an interest that
13 has been centuries old that has said the right to public
14 documents is presumptively open, so I believe that it should
15 remain that way.

16 I believe the case that they cited to support their
17 position is Judge Rosen's Eastern District case, it is a
18 criminal case, and it has involved a public official, which
19 Defendant Cantor is not a public official, and it also wanted
20 to reveal non-party information, and everything in here is
21 for a party, it is directed exactly at the parties to this
22 case, so I don't believe that case has any applicability to
23 this motion at all. That's really the only case that they
24 really are citing to try to show that they should be entitled
25 to any relief in this matter.

1 THE COURT: That one and they mentioned Seattle
2 Times.

3 MS. STINNETT: Okay, that must have been one that
4 they --

5 THE COURT: Okay. Let me hear from the Defendants.

6 MS. STINNETT: Yes, Your Honor.

7 MR. BRETZ: As to Ms. Stinnett's arguments that
8 this should be available to the public, what we are saying is
9 matters that are immaterial and do not support her
10 allegations should be stricken, especially when there is
11 evidence that it could cause irreparable harm or injury to
12 the Defendants. We are not saying that the trial should be
13 shielded from the public. We are not saying that the Court's
14 decisions should be shielded from the public view. We are
15 saying that highly questionable, if not, in my opinion,
16 totally inadmissible evidence should not be paraded around
17 for what I think is a transparent purpose to damage and
18 humiliate individuals. Ms. Stinnett can proceed with her
19 lawsuit. That's not what we are trying to say. If her
20 lawsuit stands on its own, we proceed to decisional events by
21 the Court and trial, that's fine.

22 She talks about this incident in 1994 which she
23 thinks was documented. Note that this was nine years before
24 the Plaintiff ever worked at the firm. That's the only
25 allegation anywhere in the 204 paragraphs that anyone ever

1 complained, as is required under the law, about harassing
2 behavior at the firm, and it occurred 16 years ago.

3 THE COURT: That is in paragraph 94 --

4 MR. BRETZ: Note that the -- -

5 THE COURT: Just tell me the paragraph.

6 MR. BRETZ: It is in 46, a female associate
7 complained.

8 THE COURT: That's dealing with Exhibit C?

9 MR. BRETZ: Yes, it appears -- the prior 42, 43, 44
10 deal with Exhibit C, correct.

11 THE COURT: Correct.

12 MR. BRETZ: The settlement of the lawsuit that is,
13 I believe, 100 and 101 we have attached to
14 Mr. LaFontaine's -- to our reply filed last night to
15 Mr. LaFontaine's declaration, the e-mails to the firm that
16 relate to -- they are redacted so the identifying information
17 is not there, but they talk about --

18 THE COURT: Not ever.

19 MR. BRETZ: Not ever talking about this case and
20 they quote the language from the settlement agreement, and
21 you will see on the e-mail that Ms. Stinnett is a recipient
22 of that e-mail. That has no purpose in this lawsuit and it
23 would only jeopardize third parties' interests at this point.

24 We can argue later whether it comes in to a jury or
25 a judge trial down the road.

1 THE COURT: With regard to the financial situation
2 at the firm at the time that they did the rifts?

3 MR. BRETZ: Right, and note that the settlement was
4 nearly a year earlier.

5 THE COURT: Let me ask you a question, because I
6 can't, you know, pull it up but I saw something -- there was
7 a huge article in Crain's about Brooks Kushman relating, this
8 is like years ago, and about some kind of huge settlement,
9 end of the year settlement, stuff like that, and wowzer, here
10 we are, and maybe you can talk to Mr. LaFontaine for a minute
11 and just let me know about his recollection of that because I
12 think there was not just a huge story but then an ad from
13 Brooks Kushman in Crain's, this is probably three, four,
14 five years ago. Why don't you go talk to him for a minute
15 and come back and --

16 (An off-the-record discussion was held at
17 10:49 a.m.)

18 THE COURT: I don't think it mentioned the parties
19 in the story, and it doesn't mention the parties here.

20 MR. BRETZ: Correct, and Mr. LaFontaine said it
21 said nothing about the settlement, it talked about the suit
22 and the complexity of the suit, but not the terms of the
23 settlement or amounts received.

24 THE COURT: It talked about a huge settlement, it
25 didn't list the amounts.

1 MR. LaFONTAINE: It did not list any numbers.

2 THE COURT: No, it didn't list any numbers.

3 MR. LaFONTAINE: Not that I recall. We are very
4 concerned about numbers.

5 THE COURT: I don't recall any numbers but there
6 was something relating to that, okay. Then let me ask what
7 number is the settlement?

8 MR. BRETZ: I think it is 100 and 101, I believe,
9 yes.

10 THE COURT: 100 and 101. Let me ask Plaintiff,
11 does she have a problem in terms of reformulating to say that
12 Defendants won a contingency case with a large amount -- of a
13 large sum?

14 MS. STINNETT: Your Honor, I would rather say that
15 maybe -- first of all, I didn't say what the actual numbers
16 were but I understand how it may read, but I would basically
17 say that I would be amenable to rewording it to say that in
18 the year 2008 Brooks Kushman had receivables of over
19 50 million. It doesn't talk about the case, but it does show
20 what I want to show, which is the fact that they received a
21 lot of money in 2008, and it shows that basically saying that
22 they were in financial distress was a pretext to the illegal
23 terminations.

24 THE COURT: Is that something that's -- why don't
25 you go talk to Mr. LaFontaine and then come back.

1 (An off-the-record discussion was held at
2 10:52 a.m.)

3 MR. BRETZ: The concern, Your Honor, is in
4 reference to the numbers. The firm does not handle many
5 contingency cases so if we put numbers out there it is easy
6 to connect the dots and draw the line.

7 THE COURT: So let me ask the Plaintiff, and you
8 can stand there and she can just respond, if they were
9 rewritten to say they won a large contingency case and they
10 were, you know, well flush with income, is that --

11 MS. STINNETT: I would prefer to have the number
12 there. I think well flushed doesn't give you the scope of
13 the amount.

14 THE COURT: It could come out at a later point, I'm
15 just talking for the case.

16 MS. STINNETT: Right, Your Honor. They haven't
17 showed me any type of an agreement where they said that the
18 amount they received was confidential. I know that the
19 amount between the parties may be, I haven't even seen that,
20 but they are saying that the amount they took from the case.
21 No one knows what percentage they were supposed to get from
22 the case.

23 THE COURT: We can deal with that during discovery.

24 MS. STINNETT: Okay.

25 THE COURT: Okay. Go ahead, Mr. Bretz.

1 MR. BRETZ: Yes, just a few last points, Your
2 Honor. The exhibits attached by these other individuals --

3 THE COURT: C, D and E?

4 MR. BRETZ: C, D and E, yes, Plaintiff says that
5 this shows the firm had knowledge of these matters. I think
6 she's conflating ideas. The firm had knowledge of them when
7 they were filed at the EEOC after Plaintiff's separation.
8 They were never brought to the firm's attention by Plaintiff
9 or the individuals. These individuals all went down to the
10 EEOC and filed charges of a variety of stripes and flavors,
11 and some of which related to events that occurred in the
12 1990s. That's the knowledge she is now talking about.

13 Secondly, we have never had the opportunity to
14 cross-examine these individuals as to the veracity or
15 accuracy or accuracy --

16 THE COURT: Well, that's --

17 MR. BRETZ: Understood.

18 THE COURT: -- in every case.

19 MR. BRETZ: Understood, but they are now being
20 offered as a Complaint, and that's the point I'm trying to
21 make. Whether we can fight about it as evidence down the
22 road is a separate issue, that's where I'm saying that's
23 where Rule 26 comes into play, whether these even should meet
24 the standards to be admissible. She talks about the
25 settlements at the EEOC in the Complaint, Rule 408 is very

1 clear that that's not admissible. In addition, the EEOC
2 process that we agreed to and signed an agreement to
3 participate in, the whole purpose of the EEOC is to
4 conciliate and resolve issues, and we did that with all of
5 these individuals. That should not come into evidence nor
6 should it be part of a pleading. It does not bear in any
7 sense on her -- on the value or veracity of her allegations.

8 And, finally, her attempt to distinguish
9 Judge Rosen's case I think fails because, first of all, it
10 isn't a criminal case.

11 THE COURT: Right, it isn't but one of the major
12 boldface things in Judge Rosen's opinion is it deals with
13 non-parties.

14 MR. BRETZ: As does this case, as do the very
15 exhibits --

16 THE COURT: When you say as does this case, the
17 party that you are representing is not a non-party.

18 MR. BRETZ: Correct.

19 THE COURT: And that is the essence of -- this is
20 not a non-party complaining about it, this is a party
21 complaining about it, the information, so --

22 MR. BRETZ: True, but Judge Rosen was protecting
23 the deposition of the Attorney General and we don't know what
24 else. He said there were five or six orders to seal and a
25 variety of matters that frankly we don't know about, but my

1 point here is the primary thrust of our motion deals with
2 these third parties who are not parties to this case and
3 their allegations that have no relation to her claim, and I
4 think that that sentiment, which is among many of
5 Judge Rosen's opinions, applies here, that principle applies
6 here.

7 THE COURT: Okay. Why don't you have a seat and
8 let me proceed with some rulings so the case can proceed.

9 With regard to the Exhibits C, D and E, I believe
10 that they should be stricken from the Complaint, and I
11 believe that Rule 8 which requires a short, plain statement
12 of the grounds, and they are in the Complaint, I think this
13 is like additional evidence that is not appropriate under
14 Rule 8 nor be given the nature of it, and I understand the
15 Plaintiff said scandalous behavior creates scandalous matter,
16 but on the other hand Rule 12 F talks about on a motion to
17 strike scandalous matter, I'm not saying that this is
18 scandalous, scandalous has the appearance of saying it
19 doesn't belong in the case, we will see that down the line.

20 I'm just saying that under Rule 8 to go beyond the
21 matters pleaded in the Complaint that it is inappropriate to
22 attach matters which could be 404(B), similar acts or could
23 be part of a hostile environment under the Amtrak National
24 Railroad Passenger case. I don't think you attach
25 evidentiary material to a Complaint, it is not an appropriate

1 pleading, and I think that the Plaintiff has pled a pervasive
2 environment so that is not an appropriate attachment to the
3 Complaint, so those three will be stricken from the Complaint
4 at this stage of the proceeding.

5 With regard to the settlement, which is 100 and
6 102 -- through 102, I think that the amounts given that it
7 was a confidential settlement, that the Plaintiff was at the
8 firm at that time, that obviously it is relevant to her claim
9 at a later time, that the rift from her point of view is not
10 justifiable, but I think the amounts are not appropriate in a
11 Complaint given that it was done on a confidential basis, and
12 so I'm going to order that the amounts be stricken from 100
13 to 102 and let Plaintiff submit a new Complaint with regard
14 to 100 and 101 that eliminates those amounts. Obviously it
15 is something that this Complaint will remain under seal so if
16 at a later time the Defendants says under Ashcroft vs. Iqbal
17 that she didn't plead specific enough we will have the
18 original Complaint to allow that to continue on terms of --
19 in terms of specificity.

20 With regard to the statements in the attachments
21 dealing with -- insofar as the Complaint with regards to 29
22 through 32, I'm not going to strike that. There wasn't an
23 initial request, and I'm not going to strike that at this
24 time.

25 With regard to paragraphs -- and wherever it

1 mentions Exhibit C, I'm asking the Plaintiff in terms of
2 reformulating it, and then showing it to the Defendants based
3 on my rulings, that to get rid of the term Exhibit C in all
4 the paragraphs because there will be no Exhibit C.

5 With regard to the further information, given the
6 fact that this occurred in 1994 I'm not excluding it from the
7 case, but in terms of the Complaint, and this is a matter
8 that relates to information showing a pervasive atmosphere
9 and also I think overlaying the Court's rulings is the fact
10 that this information is out on 360, the website, and given
11 the Sixth Circuit's statements with regard to the standards
12 in cases that -- both in Brown and Williamson and in the
13 Knoxville case, which came out about six months after Brown
14 and Williamson, that only the most compelling reasons can
15 justify non-disclosure of judicial records, that I think that
16 I am not going to strike 43 to 52. I'm going to strike the
17 attachments as I have already indicated but I believe that
18 the Sixth Circuit precedent requires that that not be
19 stricken.

20 100 to 101, and because it already is out, I think
21 that there is less of a justification to support the drastic
22 remedy of striking or sealing from the public. 100, 101 we
23 have dealt with.

24 106, because it is based upon the Exhibit D and it
25 quotes that, I'm going to strike 106. I believe that should

1 be stricken.

2 I'm not going to strike 107.

3 Also 114, again, because it quotes from Exhibit E
4 and Exhibit E has been stricken I'm going to strike 106 and
5 114.

6 With regard to the settlement and the appearances
7 before the EEOC, I think that that is like collateral and
8 therefore it is not a necessary and appropriate part of the
9 Complaint under Rule 8 so I'm going to strike 123 through
10 125. That is the ruling of the Court.

11 Do you want to come up with a new Complaint with
12 those changes, and I just want to note for the record that
13 this was done in open court and so anybody can and could be
14 here, and that's the ruling of the Court.

15 When you draft what we will call a Second Complaint
16 we will keep the first under seal in the record in case it is
17 necessary for the Plaintiff to argue with regard to certain
18 matters that may be raised that, you know, you didn't plead
19 this or you didn't plead that, so that will protect you.

20 Why don't you redraft the Complaint based upon what
21 I just stated, give a copy to Mr. Bretz and let him look at
22 it and see that it confirms with the Court's ruling, and we
23 will proceed with the case.

24 Have a happy New Year.

25 MR. BRETZ: Your Honor, one last housekeeping

1 matter. I will agree to accept service of the Amended
2 Complaint.

3 THE COURT: Great.

4 MR. BRETZ: Are we going to call it amended or call
5 it something different?

6 THE COURT: Call it a Second Complaint.

7 MR. BRETZ: Second Complaint.

8 THE COURT: Okay. Thank you all.

9 (Proceedings concluded at 11:07 a.m.)

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I, Robert L. Smith, Official Court Reporter of
the United States District Court, Eastern District of
Michigan, do hereby certify that the foregoing pages comprise
a full, true and correct transcript taken in the matter of
ANN MARIE STINNETT vs. BROOKS KUSHMAN, P.C. & MARK A. CANTOR,
Case No. 10-15043, on Tuesday, December 28, 2010.

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s/Robert L. Smith

Robert L. Smith, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 03/04/2011

Detroit, Michigan